Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

HOWARD M. LEE, individually and on behalf of all others similarly situated,
Petitioner and Plaintiff,

v.

AMERICAN NATIONAL INSURANCE COMPANY; AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS
Respondents and Defendants.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a State Court action alleging only State law claims is removed to federal court *solely* on the basis of *diversity* jurisdiction, whether Article III of the U.S. Constitution, which provides for federal subject matter jurisdiction only if there is an actual "controversy" between diverse parties, requires that there be a "controversy" between plaintiff and *each* defendant, in that there must be at least one Article III claim against each defendant in order to have subject matter jurisdiction over a removal action on the basis of diversity.

2. Where it is undisputed by the parties and the court in an action removed on the basis of diversity, as reflect in the unamended State Court Complaint alleging viable State law claims against two diverse defendants, that plaintiff has no Article III standing to pursue *any and all* claims against one diverse defendant, whether subject matter jurisdiction is lacking such that the federal court may, or is required to, remand the entire case back to State Court pursuant to 28 U.S.C. §1447(c).

PARTIES TO THE PROCEEDING

Petitioner

Petitioner Howard M. Lee is the Plaintiff below, and brings this action and Petition individually and on behalf of all others similarly situated.

Respondents

Respondents, who are Defendants below, are American National Insurance Company and its subsidiary American National Life Insurance Company of Texas.

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OPINIONS BELOW

The decision of the Court of Appeals denying remand is reported as *Lee v. American National Ins. Co.*, 260 F.3d 997 (9th Cir. 2001), and is reproduced in Appendix A. The Order of the United States District Court for the Northern District of California denying remand is unreported and is reproduced in Appendix B. The Ninth Circuit's Order denying rehearing en banc is unreported and is reproduced in Appendix C.

JURISDICTION

On March 4, 1999, the District Court entered its Order Denying Plaintiff's Motion for Remand, and Certifying Order for Appellate Review. App. at 24a-26a. By that Order, the District Court denied Petitioner's Motion for Remand but certified the matter for interim appeal under 28 U.S.C. §1292(b). On August 8, 2001, the United States Court of Appeals for the Ninth Circuit issued its Opinion, certified for publication, affirming the denial of remand. App. at 1a-23a. Petitioner's timely Petition for Rehearing En Banc was denied by the Ninth Circuit by Order issued September 27, 2001. App. at 27a-28a. This Court has procedural jurisdiction under 28 U.S.C. §1254(1).

The issues raised by this Petition are the *lack* of federal subject matter jurisdiction, and that this action, alleging only State law claims, should be remanded in its entirety to State court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, §2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .

28 U.S.C. §1332(a)

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and

in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

28 U.S.C. §1441(a)-(c)

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if

none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within this jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. §1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be

remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

STATEMENT OF THE CASE

A. INTRODUCTION

This Petition raises a key procedural and jurisdictional issue: as there is no federal jurisdiction unless there is complete diversity, does complete diversity require the existence of Article III[1] subject matter jurisdiction over at least one claim against each and all of the parties, in addition to diversity of citizenship between the parties. This issue of subject matter jurisdiction over diversity actions is one of first impression, and is important to and affects cases, in general, before the federal courts.

This Petition also raises a second procedural issue, which was discussed but expressly left open in this Court's decision in *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998), as to the scope and effect of the word "case" in 28 U.S.C. §1447(c). More specifically, where subject matter jurisdiction is undisputedly lacking as to all claims against one defendant in a case where the underlying acts and transactions involving the parties are intertwined, whether the district court may, or must, remand the *entire* action, or is permitted to remand that portion of the action.

The subject decision by the Ninth Circuit, namely *Lee v. American National Ins. Co.*, 260 F.3d 997 (9th Cir. 2001), not only improperly *expands* federal subject matter jurisdiction in *diversity* cases, it sets the foundation for procedural mischief whereby litigants with viable claims under State law who file in State court will find themselves removed to federal court only to have their meritorious State law claims dismissed under

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[1] U.S. Constitution, Article III §2.

Article III with no hope of remand for adjudication on the merits.

Even the Ninth Circuit acknowledges that its decision here will cause procedural complications, multiplicity of actions, and multiplicity of fora for the same parties arising from the same transactions:

> Our circuit's interpretation of §1441(a) and *Schacht*'s interpretation of §1447(c) admittedly may result in largely duplicative state and federal court proceedings in this case and others like it. A case that is properly removed in its entirety may nonetheless be effectively split up when it is subsequently determined that some claims cannot be adjudicated in federal court.

Lee, 260 F.3d at 1007; App. at 20a. Yet, the Court of Appeals asserts that this woeful predicament is necessitated by existing decisions of the Supreme Court such as *Schacht*, 524 U.S. 381:

> Lee raised this prospect as a reason for remanding this entire case (and the defendants raised it as a reason for retaining the entire case in federal court). *Schacht*, however, has foreclosed the possibility that any preference against forcing the plaintiff to split up his case, both for judicial economy reasons and because the plaintiff enjoys some entitlement to litigate his case as he chooses to, can override the language of §1447(c) proscribing a remand of the entire case when there is subject matter jurisdiction over some of it.

Lee at 1007; App. 20a-21a. This confusion in the law, procedural morass, and the unconstitutional expanding of federal subject matter jurisdiction should be resolved by this Court.

B. PROCEDURAL OVERVIEW

California Plaintiff Lee filed a consumer fraud class action on March 26, 1997 in the California Superior Court alleging only State law claims against two Texas Defendants, who are insurance companies which solicited Lee to purchase their products. *Lee* at 999, 1001; App. at 2a-3a, 5a-6a. As reflected in the Complaint, which has never been amended, Plaintiff Lee purchased multiple insurance policies from Defendant American National Insurance Company ("ANICO") but purchased *none* from ANICO's subsidiary, the other Defendant American National Life Insurance Company of Texas ("ANTEX"). *Lee* at 999; App. at 2a. Defendants removed the California action to federal court on the sole basis of diversity jurisdiction. *Lee* at 999; App. at 3a, 24a. After the case proceeded in federal court, and almost two years later, Defendants took the position that Plaintiff Lee lacked standing under Article III to assert *any and all* claims against one Defendant, since Plaintiff did not sustain any "actual injury" given that he did not purchase any products from Defendant ANTEX. *Lee* at 999, 1001; App. at 3a, 5a, 6a, 25a.

Upon concurrence by the District Court of Defendants' position, Plaintiff Lee filed a motion for remand under 28 U.S.C. §1447(c), as it now appeared that the District Court lacked subject matter jurisdiction. *Lee* at 1000; App. at 3a. The District Court denied remand, relying solely upon *federal question* cases and applying pendent jurisdiction concepts to this *diversity* case. *Lee* at 1000; App. at 4a. Yet, Article III prohibited the District Court from proceeding with adjudication

of the claims against Defendant ANTEX, while established law prohibited the District Court from dismissing (rather than remanding) these state law claims in a removed action. The District Court placed Plaintiff Lee in an impossible procedural position, holding that it would not remand *any* claims and would treat all of the claims against Defendant ANTEX as though dismissed. *Lee* at 1000-1001; App. at 4a, 6a-7a. *If remand had been granted*, then all of the claims against all of the Defendants could be litigated in one action and one forum.

As Defendants and the District Court were unable to present *any* case on point as to the issues presented, the District Court granted leave to appeal the denial of remand. App. at 25a. Review was granted by the Court of Appeals, which upheld denial of remand, relying solely upon federal question decisions and ignoring the specific language of Article III which requires not only diversity between all the parties but also that there be a "controversy" between the parties. App. at 1a-23a.

C. LACK OF ARTICLE III STANDING EXISTED AT THE TIME OF REMOVAL

In his Complaint, Plaintiff Lee asserted a business practice of consumer fraud being perpetrated by Defendants against their policyholders and potential customers. In the Complaint, which had never been amended since the time of filing, Plaintiff specifically alleged that he *purchased* multiple life insurance policies from Defendant ANICO, and that he was subjected to deceptive sales practices by Defendant ANTEX *but did not purchase any life insurance policies from ANTEX.* *Lee* at 999, 1002; App. at 2a-3a, 8a.

On April 24, 1997, Defendants removed the action to federal district court on the basis that federal subject matter

jurisdiction existed solely due to *diversity* of citizenship. *Lee* at 999; App. at 3a. Plaintiff did not contest removal as being *procedurally* defective, and the case proceeded in the District Court. Defendants filed an Answer to the Complaint, and never filed a motion to dismiss. *Lee* at 999; App. at 3a. At the time of removal, and at the time of the remand motion, the District Court lacked subject matter jurisdiction over *all* claims alleged against Defendant ANTEX. It is undisputed that there is no subject matter jurisdiction under Article III as to the claims against Defendant ANTEX because Plaintiff never purchased any insurance policy from ANTEX and thus has no actual injury. *Lee* at 1001-1002; App. at 6a-8a.

D. DEFENDANTS ASSERT, AND THE DISTRICT COURT FINDS, LACK OF ARTICLE III STANDING DURING RULINGS ON CLASS CERTIFICATION

After proceeding with the case in federal court, Defendants then took a diametrically *oppose* position, contending that federal court did *not* have subject matter jurisdiction over *any and all* of Plaintiff's claims against defendant ANTEX. *Lee* at 1001; App. at 6a. As alleged in the Complaint, Plaintiff was fraudulently solicited to purchase *but did not purchase* insurance products from Defendant ANTEX. Under the California Business & Professions Code, Plaintiff undisputedly has *viable* claims against ANTEX and standing to sue ANTEX under California law in California State court. *Lee* at 1001-1002; App. at 7a. Yet Defendants contended and the courts below concurred that *all* of Plaintiff's claims against Defendant ANTEX are outside the subject matter jurisdiction of federal courts, pursuant to Article III §2 of the U.S. Constitution. *Lee* at 1001-1002; App. at 6a-8a.

Plaintiff Lee filed two separate motions for class certification. App. at 24a. At the hearing of June 16, 1998 on the first motion, the District Court denied certification of a *nationwide* class consisting of all participating whole life and all universal life policyholders of both Defendants. In making its ruling on nationwide class certification, the District Court held that Plaintiff Lee was not typical for purposes of being a class representative on claims against ANTEX, because he did not *purchase* an ANTEX policy, but was only solicited to purchase an ANTEX policy. The District Court also ruled that Plaintiff Lee may be an adequate class representative to *California* policyholders, but that he potentially had a conflict of interest with policyholders in other states, who may have different claims under the law of their states. *See*, App. at 30a-31a.

In light of and mindful of the District Court's rulings, Plaintiff filed a second motion for class certification of a more limited nature on July 1, 1998 – seeking to represent a class of *California* policyholders. *Lee* at 999; App. at 3a. Given that the District Court had previously ruled that Plaintiff Lee had no standing to assert claims against ANTEX where the claims required an actual purchase, i.e., reliance and damages, Plaintiff Lee narrowed his motion for class certification as to ANTEX, limited to *only* the claims under California Business & Professions Code Sections 17200 and 17500, for unfair business practices and deceptive advertising practices. *See,* App. at 32a-34a.

It is beyond dispute under California law that these Business & Professions Code violation claims do *not* require individual purchase, individual reliance, individual damages, intent of defendants, or even any contact whatsoever between the plaintiff and the defendant. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553 (1998); *State Farm Fire &*

Casualty Co. v. Superior Court, 45 Cal.App.4th 1093 (1996); *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632 (1996); *ABC International Traders, Inc. v. Matsushita Electric Corp.*, 14 Cal.4th 1247 (1997). *See*, *Lee* at 1001; App. at 7a. As to the claims against Defendant ANICO, Plaintiff narrowed his second class certification motion to a California class, and only pertaining to participating whole life policies, but proceeded on all causes of action alleged against ANICO.

Defendants, in addressing the motion for certification of the California class, and the District Court in denying certification of the California class at the hearing on October 2, 1998, raised for the first time the position that Plaintiff Lee lacked standing to raise *any* claims against ANTEX, even under the California Business & Professions Code, because the standing requirements under California law are broader than the standing elements under Article III of the U.S. Constitution. *Lee* at 1001-1002; App. at 3a, 8a. Defendants argued and the District Court ruled that Article III requires an "actual injury" by Plaintiff, even though if these claims were litigated in California state court -- where they were originally filed -- Plaintiff *would* have standing under these California statutory claims, which do *not* require any actual injury by the plaintiff or the Class members. App. at 25a, 32a-34a.

E. THE DISTRICT COURT DENIES REMAND OF THIS DIVERSITY CASE ON THE SOLE BASIS OF FEDERAL QUESTION DECISIONS

As it now appeared that the District Court lacked subject matter jurisdiction, given the District Court's rulings and the arguments of Defendants, Plaintiff Lee filed a motion for remand on November 6, 1998. App. at 25a. The District Court denied remand at the hearing on December 11,1998, and

entered its Order denying remand on March 4, 1999. App. at 24a-26a.

Plaintiff contended that as "complete" diversity is required for federal jurisdiction as to *each* and all defendants, Article III requires that there be subject matter jurisdiction, i.e., a "controversy", between Plaintiff and *each* Defendant. *Lee* at 1000; App. at 4a. In order to have jurisdiction in a diversity case, there must be at least *one* justiciable claim between Plaintiff and *each* Defendant – and here it is undisputed that there is *no* justiciable claim between Plaintiff and ANTEX.

The District Court denied remand of this diversity case, relying solely upon *federal question* cases and analogies to pendent jurisdiction situations. Further, it held that only an *entire* case can be remanded, not a portion thereof; and refused to remand even the ANTEX claims – and instead held that it would *treat them as though dismissed. Lee* at 1000; App. at 4a.

Plaintiff is being completely deprived of any and all claims against Defendant ANTEX, including indisputably viable claims under California Business & Professions Code Sections 17200 and 17500, because of lack of subject matter jurisdiction, yet the District Court denied remand of those claims for adjudication in State court – where they were filed in the first place.

The district court certified these issues of first impression for appellate review under 28 U.S.C. §1292(b), which was granted by the Ninth Circuit. App. at 25a.

F. THE COURT OF APPEALS' OPINION

In its Opinion of August 8, 2001, the Court of Appeals held that as long as there is *one* justiciable claim between one

plaintiff and *one* of multiple defendants, and diversity of citizenship exists between all plaintiffs and all defendants, that federal subject matter jurisdiction exists. App. at 1a-23a. In making that determination, the Ninth Circuit relied *solely* upon cases involving *federal question* jurisdiction – *not* diversity jurisdiction – and in which cases the plaintiff had at least one justiciable cause of action against each defendant. Thus, none of those cases dealt with the situation presented here.

In order to have federal subject matter jurisdiction over a lawsuit, Article III mandates that there be a "case" arising from federal law *or* a "controversy" between persons of diverse citizenship. Diversity jurisdiction statute, 28 U.S.C. §1332, and removal upon the existence of original federal jurisdiction under 28 U.S.C. §1441(a), must conform with and must be read in conjunction with the jurisdictional requirements of Article III. Just as there must be "complete" diversity between the parties for federal jurisdiction under Section 1332, there must always *also* be Article III subject matter jurisdiction, i.e., *a "controversy"* between the diverse parties, between plaintiff and *each* defendant. The Court of Appeal found it undisputed that there is no Article III subject matter jurisdiction over *any* of the claims alleged by Plaintiff Lee against Defendant ANTEX. *Lee* at 1001; App. at 6a-8a. Plaintiff contended that if there is not subject matter jurisdiction between each of the parties in a *diversity* case, then the case should be remand in its entirety to state court. *Lee* at 1001-1001; App. at 8a.

In its Opinion, the Ninth Circuit *rejected* Plaintiff's position on three grounds: (1) "there is original jurisdiction, and therefore removal jurisdiction under 28 U.S.C. §1441(a), over a case as long as there is subject matter jurisdiction over one or more of the claims alleged"; (2) "although the complete diversity rule is, in a sense, an exception to that principle, it is one that is based on a longstanding interpretation of the statute

governing diversity jurisdiction that is of no pertinence to the question before us"; and (3) "the Supreme Court's decision in *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 391-92 (1998) makes clear that a district court may not under §1447(c) remand a case in its entirety where there is subject matter jurisdiction over some portion of it". *Lee* at 1002; App. at 9a.

The Court of Appeal *rejected* the Supreme Court's prior holdings that federal question jurisdiction is different from diversity jurisdiction, in that one is favored and the other is disfavored. Each and all of these grounds for denial of remand are contrary to the express language of Article III, contrary to the established standards of interpretation in remand situations, contrary to the *actual* language and holdings of the Supreme Court, and erroneously founded upon *federal question* jurisdiction cases.

ARGUMENT FOR GRANTING WRIT

Pursuant to Rule 10(c) of the Supreme Court Rules, the granting of this Petition for Writ of Certiorari is appropriate as the Court of Appeals has decided an important question of federal law, and specifically of federal subject matter jurisdiction and of remand procedures, that has not been, but should be, settled by this Court; and/or has decided an important federal procedural question in a way that conflicts with relevant decisions of this Court.

A. OVERVIEW

Before there can be *any* federal jurisdiction, there must be compliance with the requirements of Article III of the U.S. Constitution. Federal courts do not, and should not, invite jurisdiction over cases involving solely State law claims; and

removal of diversity cases is disfavored. Whether there is diversity of citizenship between opposing parties, Article III mandates that there be Article III subject matter jurisdiction over claims between the plaintiff and *each* defendant for federal court to exercise diversity jurisdiction over the case. If not, the entire case should be remanded to State court, where adjudication of all claims and all parties is permitted.

This Petition raises issues of first impression regarding subject matter jurisdiction of federal courts in *diversity* cases, and regarding removal and remand of such diversity cases, where there is *undisputedly* no "controversy" under the United States Constitution, Article III §2, between the plaintiff and one of the defendants, and thus *none* of the claims against one defendant are within the subject matter jurisdiction of federal courts.

Other than the subject decision, *Lee v. American National Ins. Co.*, 260 F.3d 997, the parties and the Courts below have been unable to find *any* case law holding that a federal court may exercise diversity jurisdiction where it lacked Article III subject matter jurisdiction over *all* claims against one of the defendants.

Further, this Petition raises the issue discussed but expressly left open in this Court's decision in *Schacht*, 524 U.S. 381, as to the scope and effect of the word "case" in 28 U.S.C. §1447(c). More specifically, where subject matter jurisdiction is undisputedly lacking as to all claims against one defendant in a case where the underlying acts and transactions involving the parties are intertwined, whether the district court may, or must, remand the *entire* action, or is permitted to remand that portion of the action.

B. ARTICLE III MANDATES THAT THERE BE A "CONTROVERSY" BETWEEN *EACH* OF THE PARTIES IN ORDER TO HAVE FEDERAL SUBJECT MATTER JURISDICTION

Federal jurisdiction cannot exist outside of Article III, section 2, of the United States Constitution. In regard to federal jurisdiction based upon diversity, the Constitution provides federal subject matter jurisdiction "to Controversies . . . between citizens of different States". *Id.* thus, under the express language of the Constitution, it is not enough that the parties are of diverse citizenship, but there must also be a "controversy" between the parties.

The jurisdiction of federal courts is defined and limited by Article III of the Constitution. *Flast v. Cohen*, 392 U.S. 83, 94, 88 S.Ct. 1942 (1968). Standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130 (1992). Subject matter jurisdiction is directly dependent upon the existence of Article III standing. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104 (1982); *City and County of Denver v. Matsch*, 635 F.2d 804, 808 (10th Cir. 1980). If the plaintiff lacks Article III standing to pursue the alleged claims, because of plaintiff's lack of a "personal stake" or "actual injury", then there is no federal jurisdiction. *City and County of Denver* at 808.

United States Constitution, Article III, Section 2 is the foundation and the sole Constitutional premise for any and all federal subject matter jurisdiction. Article III expressly requires not only diversity of citizenship but also that there be a "controversy" between those parties in order to have subject matter jurisdiction in the first place. In addressing this issue of

first impression, *the Ninth Circuit held Article III "has nothing to do with" whether diversity jurisdiction exists*, and that the only requirement for such federal subject matter jurisdiction is diverse citizenship between the parties and a sufficient amount in controversy. Such holding by the Court of Appeals is at odds with the pronouncements of this Court that Article III requirements permeate and supersede all federal jurisdiction grounds.

> Under Article III, §2 of the Constitution, the federal courts have **jurisdiction** over this dispute between appellants and appellees **only** if it is a "case" or "controversy." This is a "bedrock requirement." [Citation.] As we said in *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 27, . . ., "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (Bold added.)

Raines v. Byrd, 521 U.S. 811, 117 S.Ct. 2312, 2317 (1997). "The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity" to decide actual controversies. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 758 (1982); *Allstate Ins. Co. v. Wayne County*, 760 F.2d 689, 692 (6th Cir. 1985). "Article III obligates a federal court to act only when it is assured of the power to do so, that is, when it is called upon to resolve an actual case or controversy." *Valley Forge*, at 476 n. 13.

Certiorari should be granted, as the Ninth Circuit held original federal subject matter jurisdiction exists – and thus grounds for removal under Section 1441(a) – if there is bare compliance with the diversity statute, Section 1332, *even if there is not subject matter jurisdiction under Article III. Lee*, 290 F.3d at 1002, 1005, 1008; App. at 9a-11a, 13a-16a. Yet, Section 1332 does not, and cannot, exist in a vacuum. It must be read in conjunction with Article III, which is the Constitutional basis for Congress to even enact these statutes.

"Congress may, by legislation, expand standing to the full extent permitted by Article III. . . . In no event, however, may Congress abrogate the Article III minima". *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608 (1979).

This lawsuit was filed in State court and alleges only State law claims. If Article III subject matter jurisdiction is lacking, a case should remain in and be adjudicated by the State court. "[F]ederal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress." *Aldinger v. Howard*, 427 U.S. 1, 15, 96 S.Ct. 2413, 2420 (1976).

This Court has acknowledged that the existence of federal jurisdiction *in the first instance* depends upon Article III of the Constitution *even if* the case procedurally falls within express terms of a jurisdictional statute. For example, in *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582, 69 S.Ct. 1173 (1949), a District of Columbia corporation asserted diversity jurisdiction, pursuant to an Act of Congress amending 28 U.S.C. §41 to confer jurisdiction of federal courts over disputes between citizens of States or of the District of Columbia or of particular territories. The Supreme Court held that the proper and first inquiry is whether federal

jurisdiction would exist under Article III. *Id.* at 586-587. This Court held that under the express language of Article III, the District of Columbia was not a "State"; and thus Congress did not have authority under Article III to enact the jurisdictional *statute*. *Id.* at 588.

Instead, the Supreme Court held that under the special power provided under Article I of the Constitution, pertaining "to exercise exclusive Legislation in all Cases whatsoever over such District" of Columbia, the statute was constitutional. *Id.* at 589. In so holding, the Supreme Court found that the jurisdictional statute did not violate the Article III requirement of a "controversy" in diversity cases: "The jurisdiction conferred is limited to controversies of a justiciable nature". *Id.* at 591.

As another example, in *Steel Company v. Citizens For A Better Environment*, 523 U.S. 83, 118 S.Ct. 1003 (1998), a citizens' group brought a private enforcement action under a federal statute, based upon past violations by defendant. The Supreme Court held that the *first* inquiry must be whether subject matter jurisdiction exists under Article III, and specifically whether plaintiff had presented a justiciable "case" or "controversy" under Article III, *even though the lawsuit was brought for violation of a federal Act*. The majority opinion *rejected* the contention of the dissent that Article III requirements, including judiciability, are to be decided after the court takes jurisdiction (*id.* at 92-93) – the dissent advocated that the viability of the federal cause of action should be determined first, which is a merits issue.

> We decline to endorse such an approach [advocated by the dissent] because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles

> of separation of powers . . . "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." [Citation.] The requirement that jurisdiction be established as a threshold matter "springs from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." [Citation.]

Steel Company, at 94-95. The first inquiry must be "whether there is a case or controversy under Article III." *Id.* at 97, 102-104.

The decision of the Court of Appeal here holds that a statute (28 U.S.C. §1332) *trumps* the United States Constitution (Article III) in deciding the existence of diversity jurisdiction in the first place. The Ninth Circuit approached this Constitutional issue *backwards*, holding that the issue of subject matter jurisdiction under Article II does *not* pertain to the existence of federal jurisdiction, but rather is an issue only to be addressed *after* federal jurisdiction has been assumed by the district court, and that Article III only pertains to the ability of a party to actually litigate claims in a federal action. This is error of Constitutional magnitude; and the Petition for Writ of Certiorari should be granted.

C. FEDERAL LAWS ARE CONSTRUED *AGAINST* DIVERSITY JURISDICTION AND *AGAINST* REMAND, AND CONVERSELY IN *FAVOR* OF REMAND OF ACTIONS ALLEGING ONLY STATE LAW CLAIMS

In upholding the denial of remand and in finding that subject matter jurisdiction exists because of the diversity statute alone, the Ninth Circuit's decision directly conflicts with the established federal standard that federal laws are to be *strictly construed **against** removal* and *liberally construed **in favor** of remand*. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996); *Nishimoto v. Federman-Bachrach & Associates*, 903 F.2d 709, 712 n. 13 (9th Cir. 1990); *Gould v. Mutual Life Ins. Co. of New York*, 790 F.2d 769, 773 (9th Cir. 1986); *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368 (9th Cir. 1987); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 71 (7th Cir. 1992); *La Chemise Lacoste v. Alligator Co., Inc.*, 506 F.2d 339, 344 (3rd Cir. 1974).

This is especially true in the cases where the only putative ground for federal subject matter jurisdiction is *diversity* (as opposed to federal question), as concerns of comity mandate that state courts be allowed to decide state cases unless the removal action falls squarely within the bounds Congress and the U.S. Constitution have created.

"The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288, 58 S.Ct. 586, 590 (1938). The Supreme Court has long acknowledged legislative intent to keep federal jurisdiction restrictive, and that removal statutes be strictly construed.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-109, 61 S.Ct. 868 (1941). "The policy of the [diversity] statute calls for its strict construction." *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700 (1934).

For example, Section 1441(c), 28 U.S.C. §1441(c), used to allow the possibility of a federal court obtaining subject matter jurisdiction, upon diversity grounds, and removal of the action to federal court, where plaintiff and *one* defendant were diverse, although plaintiff and *another* defendant were *not* diverse, if the claims were independent. No more.[2]

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[2] Old Section 1441 (c) provided:

> Whenever a separate and independent claim or cause of action, *which would be removable is sued upon alone*, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, *remand all matters not otherwise within its original jurisdiction.*

Present Section 1441(c) now provides:

> Whenever a separate and independent claim or cause of action *within the jurisdiction conferred by section 1331 of this title*, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may *remand all matters in which State law predominates.*

(*Italics* indicate the differences in language of the statutes.)

Section 1441(c) was amended effective December 1990[3] to *bar* federal courts from taking jurisdiction over a case removed on the basis of diversity unless *all* requirements of diversity jurisdiction had been fulfilled as to *all* parties, thus limiting removal of diversity cases to *only* those falling within the confines of Section 1441(a). *See*, *Baylor v. District of Columbia*, 838 F.Supp. 7, 9 (D.D.C. 1993); *Moore v. DeBiase*, 766 F.Supp. 1311 (D.N.J. 1991) (discussing history of the revision); *Neibuhr v. National R.R. Passenger Corp.*, 955 F.Supp. 135, 138 (D.D.C. 1997). "The obvious effect of amended section 1441(c) will be a reduction in the number of diversity cases removed into federal court under section 1441(c). [Citation.]" *Moore* at 1318 n. 13.

Indeed, the Report of the Federal Courts Study Committee recommended the complete repeal of section 1441(c). *Moore* at 1316-1317. Congress *agreed* with the Committee that removal of lawsuits under section 1441(c) on *diversity* jurisdiction should no longer be permitted, but Congress did *not* agree to repeal of section 1441(c) on cases involving a federal question. *Id.* at 1317-1318.

> Congress was sensitive, however, to the desirability of retaining removal on the basis of federal question jurisdiction and therefore declined to repeal section 1441(c). Rather, Congress opted to amend section 1441(c) to restrict the application of section 1441(c) to only cases in which there were federal questions, thus eliminating any possibility that section 1441(c) could be invoked in a non-

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[3] Judicial Improvements Act of 1990, Pub.L. No. 101-650 §312, 104 Stat. 5089, 5114 (1990).

> federal question case in which diversity was destroyed. [Citations.] "The amendment would . . . retain the opportunity for removal in the one situation in which it seems clearly desirable. . . ." [Citations.]

Moore at 1317-1318. By revising Section 1441(c), Congress expressed its public policy, consistent with Article III, that if there was only subject matter jurisdiction over one defendant, but not another, the case should remain in State court.

In conflict with existing law, the majority opinion by the Ninth Circuit held, without reference to *any* legal authority so holding, that "[t]here is no meaningful distinction between federal question and diversity jurisdiction". *Lee*, 290 F.3d at 1004; App. at 13a. Indeed, as its second ground for denial of remand, the Court of Appeal held that the diversity statute and the requirements of complete diversity are *irrelevant* to the issues presented. *Lee* at 1002; App. at 9a.

Although the Ninth Circuit, throughout its decision, asserts that it is relying upon this Court's decision in *Schacht*, in fact the Supreme Court noted in *Schacht* that there is a very real distinction -- for purposes of determining federal subject matter jurisdiction -- between a diversity case and a federal question action. *Schacht*, 118 S.Ct. at 2052. It was emphasized by this Court in *Schacht* that while the affirmative defense of Eleventh Amendment immunity can be waived, lack of original federal jurisdiction can never be waived. *Id.* at 2052. Federal jurisdiction over a *federal question* claim or its viability is not called into question until after filing of the Answer (as that affirmative defense can be waived) while, conversely, *diversity* jurisdiction is determined in the first instance on plaintiff's complaint allegations (which lack of jurisdiction is never waived). *Id.* at 2052.

Indeed, in his concurring opinion below, even Justice Kozinski *disapproved and disagreed* with the Ninth Circuit majority's reliance upon federal question cases for determination of jurisdiction over this diversity case, and its ruling that jurisdiction over one claim against one defendant is sufficient for *any* federal jurisdiction:

> It's true that, in federal question cases, a jurisdictional bar against some claims does not deprive a court of jurisdiction where other claims arise under federal law. [Citations.] But here we don't have a case where some claims arise under federal law and others don't: None of them do, which is why the case falls within the district court's original jurisdiction only under section 1332, not 1331.

Lee, 260 F.3d at 1008; App. at 22a.

Indeed, the Court of Appeals decision would now *foster* what Section 1441(c) seeks to *prohibit*; namely, the removal to federal court of State law actions which do not involve a federal question and over which the federal court does not have Article III subject matter jurisdiction to adjudicate in their entirety.

D. ARTICLE III MUST PREVAIL

In its Opinion, the Ninth Circuit ignores the specific language of Article III which requires that there be a "controversy" between the diverse parties in order to have federal subject matter jurisdiction: "The judicial Power shall extend . . . – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; . . ." U.S. Const., Art. III, §2.

Instead the Court of Appeals relies solely upon the requirements of the diversity *statute*, 28 U.S.C. §1332, without juxtaposition with Article III – its jurisdictional wellspring.

The Ninth Circuit claims that there is nothing unique about the federal court having subject matter jurisdiction over a lawsuit where it has jurisdiction over at least one claim, but not all claims. Yet, the Court of Appeals relies *exclusively* upon federal question cases, and upon concepts of supplemental jurisdiction and pendent state claims, and provides *no diversity cases* supporting its position. Lacking any authority on point, the Court of Appeals held that there is no relevant or material distinction between federal question jurisdiction and diversity jurisdiction. *Lee*, 290 F.3d at 1004; App. at 13a. Such a proposition is not only belied by existing decisions of the Supreme Court, but is *not* reflected in the Supreme Court decisions espoused by the Ninth Circuit in its decision. Accordingly, such confusion and dichotomy should be resolved by this Court.

The Court of Appeals claims that its holding is supported by two Supreme Court decisions, namely *Schacht*, 524 U.S. 381 and *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523 (1997), both of which are *federal question* cases. *Lee* at 1003-1007. Although these cases indicated a federal court may have original jurisdiction, and thus subject matter jurisdiction after removal, if there is at least one *federal claim*, that is *not* the issue presented here.

Rather, unlike *Schacht* or any other cases cited by the Ninth Circuit, it is undisputed that there is no subject matter jurisdiction under Article III over *any and all* of the claims alleged by Plaintiff Lee against Defendant ANTEX. None. There is no Article III "controversy" between Plaintiff Lee and Defendant ANTEX upon which to bootstrap any

"supplemental" jurisdiction. Indeed, the concurring opinion of Justice Kozinski specifically *rejects* the majority opinion's application to federal question cases to resolve diversity case issues. *Lee* at 1008-1009; App. at 23a ("[R]eliance on federal question cases where the district court has jurisdiction over some but not all of the claims is inapposite in a case where jurisdiction is established on the basis of diversity.").

The same is true as to *City of Chicago*, where this Court addressed the situation of whether federal jurisdiction exists, upon removal, over a matter pending before a state court on appeal after an administrative proceeding. In *City of Chicago*, the matter was held to be a federal law question on Constitutional issues, and that any and all state law claims could also be subject to federal jurisdiction under principles of pendent and ancillary jurisdiction. The analysis of this Court in *City of Chicago* was based upon 28 U.S.C. §1367, the supplemental jurisdiction statute, because all the other claims were "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *City of Chicago*, 118 S.Ct. at 530, quoting from 28 U.S.C. §1367(a).

The converse exists here – the Court of Appeals held that there is absolutely no case or controversy between Plaintiff Lee and Defendant ANTEX. Accordingly, as a matter of law and public policy, supplemental jurisdiction *cannot exist;* and the analysis of *City of Chicago* is inapplicable.

Indeed, this Court in *City of Chicago distinguished* between federal question cases and diversity cases. *Id.* at 532. The diversity cases distinguished by the Supreme Court in *City of Chicago*, namely *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 74 S.Ct. 290 (1954) and *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 81 S.Ct. 1570 (1961) provide no answers either,

as no Article III issue was presented. In *Horton*, the requirements of diversity existed and the issue was whether this Court should *infer* a "carve-out" of worker's compensation cases from federal jurisdiction based upon Legislative history. In *Stude*, the basic requirements of diversity did not exist, and thus remand was held to be appropriate.

E. REMAND IS THE ONLY APPROPRIATE ACTION WHEN NONJUSTICIABLE CLAIMS ARE REMOVED TO FEDERAL COURT

Although claims which are beyond Article III subject matter jurisdiction may properly be dismissed *if the case is filing in federal court in the first instance*, the situation is *different* where the claims were originally filed in State court and removed to federal court. It is well-established that in the case of a *removed* action, it is *reversible error* to dismiss claims for lack of subject matter jurisdiction, as those claims must be *remanded* instead. *Crenshaw v. Great Central Ins. Co.*, 482 F.2d 1255, 1259 (8th Cir. 1973); *Armstrong v. Armstrong*, 508 F.2d 348, 350 (1st Cir. 1974); *M.A.I.N. v. Commissioner, Maine Dept. of Human Services*, 876 F.2d 1051, 1053-1054 (1st Cir. 1989); *In re Orthopedic Products Liability Litigation*, 132 F.3d 152, 155 (3rd Cir. 1997); *Williams v. City of Atlanta*, 794 F.2d 624, 628 (11th Cir. 1986) ("The reason is simple; if the federal court acting in removal jurisdiction determines that federal jurisdiction does not exist, it remands rather than dismisses because removal was 'improvident.' The scope of the district court's discretion, therefore, was between adjudicating the state law claims or remanding them; it had no discretion to dismiss them.")

Uniquely, the District Court held that since it is not permitted, as a matter of law, from dismissing the removed claims over which there is no Article III subject matter

jurisdiction, it would simply *treat* the claims as though dismissed! *Lee*, 290 F.3d at 1007; App. at 4a, 6a-7a. The Court of Appeals indicated that the District Court is permitted to dismiss the claims – citing no authority, and holding contrary to existing authority. *Lee* at 1006.

F. THE SUPREME COURT HAS ACKNOWLEDGED THAT REMAND OF THE ENTIRE CASE MAY BE PERMISSIBLE HERE

The Ninth Circuit's decision creates a procedural anomaly – causing jurisdictional mischief – that a State court action removed upon grounds of federal question jurisdiction may be remanded *in whole or in part* under 28 U.S.C. §1447(c); *yet* a State court action removed upon grounds of diversity jurisdiction may *never* be remanded *in part*, and can only be remanded in whole if there is no Article III standing as to all claims against all defendants. *Lee* at 1006-1007. Plaintiff has been caught in the riptide of this anomaly – a problem which would never exist if this Court grants this Petition and appropriately holds that there must be subject matter jurisdiction over at least one claim against each defendant in order to have diversity jurisdiction over a removed action – otherwise the case should be left to be adjudicated in its entirety in State court, where it was filed in the first place.

The remand statute, 28 U.S.C. §1447(c), *mandates* that a removed case be remanded to State court whenever it comes to the court's attention that it does not have subject matter jurisdiction. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the *case* shall be remanded." 28 U.S.C. §1447(c).

In its decision in *Schacht*, this Court expressly reserved the issue of the meaning and scope of the word "case" in the

mandatory remand language of the remand statute, 28 U.S.C. §1447(c): *See*, *Schacht*, 118 S.Ct. at 2054. In *Schacht*, this Court indicated that it might be interpreted two ways:

> An ordinary reading of the language indicates that the statute refers to an instance in which a federal court "lacks subject matter jurisdiction" over a "case," and not simply over one claim within a case. Cf. §1441(c) (permitting "the entire case" to be removed or remanded, when one or more "non-removable claims or causes of action" is joined with a federal question "claim or cause of action"). Conceivably, one might also read the statute's reference to "case," to include a claim within a case as well as the entire case.

Schacht, 118 S.Ct. at 2054. Thus, this Court acknowledged that remand of the entire case may be appropriate and permissible where the federal court lacks subject matter jurisdiction over claims within an action. Indeed the second and *broader* construction is completely consistent with established federal standards that all removal laws should be strictly construed against federal jurisdiction and all remand laws should be broadly construed in favor of remand. *Duncan*, 76 F.3d at 1486; *Sullivan*, 813 F.2d at 1371.

Here, the federal court does not lack jurisdiction "simply over one claim", but rather there is no subject matter jurisdiction as to *all* claims against one defendant. Thus, the circumstances fall within Section 1447(c) as there is indeed a "lack of subject matter jurisdiction," and thus such a "case" should be permitted, and indeed mandated, to be remanded back to the State court from whence it came.

CONCLUSION

As this Court stated in *Valley Forge*, 454 U.S. at 476:

> Article III, which is every bit as important in its circumscription of the judicial power of the United States as in granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit . . .; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787 . . .

For all the foregoing reasons, it is respectfully requested that this Honorable Court grant the Petition for Writ of Certiorari and accept consideration of the important issues of first impression of Constitutional magnitude and pertaining to the scope of federal subject matter jurisdiction on grounds of diversity.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-15846

OPINION

Howard M. Lee, Individually and on behalf of all others similarly situated, Plaintiff-Appellant,	)
v.	)
American National Insurance Company; American National Insurance Company of Texas, Defendants-Appellees.	)

Appeal from the United States District Court
for the Northern District of California.
D.C. No. CV-97-01532-CAL.
Charles A. Legge, District Judge, Presiding.

Argued and Submitted
November 13, 2000 - San Francisco, California
Filed August 8, 2001

Before: Alex Kozinski, Michael Daly Hawkins and Marsha S. Berzon, Circuit Judges.

Court of Appeals Opinion, August 8, 2001

Opinion by Judge Berzon;
Partial Concurrence by Judge Kozinski.

OPINION

BERZON, Circuit Judge:

This case presents the question whether, in a diversity action removed from state court, the entire case must be remanded if the plaintiff lacks Article III standing as to one of several defendants. We conclude that the case need not be remanded, and therefore affirm the district court's denial of plaintiff Howard Lee's motion to remand his suit, in its entirety, to state court.

I. Background

Howard Lee purchased several life insurance policies for himself and members of his family from American National Insurance Company ("ANI"). In exchange for fixed premium payments for a preset number of years, these policies promised a specific schedule of increasing dividends. According to Lee's complaint, however, these benefits were never realized. Similar life insurance policies were issued by the American National Life Insurance Company of Texas ("ANTEX"), a wholly owned subsidiary of ANI, but Lee never bought one of these policies.

On March 26, 1997, Lee filed a complaint in California Superior Court on behalf of himself and all other buyers of similar ANI and ANTEX life insurance policies since January 1, 1988. Lee's complaint alleged that because ANI and ANTEX sold policies promising dividends they

failed to deliver, their marketing practices violated the California Unfair Business Practices Act, Cal. Bus. & Prof. Code §§ 17200 and 17500. Lee also alleged common law causes of action for fraud, breach of the covenant of good faith and fair dealing, negligent misrepresentation, negligence, and unjust enrichment. Asserting that the parties were diverse, ANI and ANTEX promptly removed the case to district court. Lee did not contest the removal.

Over the ensuing months, Lee twice moved unsuccessfully for class certification, each time narrowing the scope of the putative class. At the hearing on Lee's second motion for class certification, the district court explained that because Lee had not purchased an ANTEX policy, he could not demonstrate that he had suffered an actual injury and therefore could not establish standing to bring suit in federal court. Even though the California unfair business practices statute requires no such actual injury to pursue a claim in state court, said the district court, Article III of the Constitution "takes priority" in federal court over the California statute's more liberal standing rules.

Lee then moved to remand the case to state court.[1] The crux of Lee's argument was that because subject matter jurisdiction was lacking over some of his claims, remand of those claims was mandatory under 28 U.S.C. § 1447(c), and that remand of the justiciable claims together with the non-justiciable claims served the interests of judicial economy and

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[1] Because Lee's remand motion was premised on the district court's lack of subject matter jurisdiction over the case, it was not untimely. *See* 28 U.S.C. § 1447(c).

convenience.

This motion, too, was denied.[2] Although Lee's claims against ANTEX had not been dismissed, the district court's ruling on the remand motion was premised on its previous holding that the court lacked jurisdiction under Article III over Lee's claims against ANTEX. The district court noted that the propriety of removal generally turns upon whether the case is within the district court's original jurisdiction, that there is original jurisdiction over Lee's case because there is complete diversity of the parties, and that dismissal of some but not all claims ordinarily does not affect a district court's original jurisdiction as long as there is jurisdiction over the remaining claims. Dismissal of some claims for lack of Article III standing, the district court reasoned, therefore provides no basis for concluding that removal was improper or that remand of the entire case is appropriate, as long as the remaining claims are within the court's subject matter jurisdiction and justiciable under Article III.

The district court certified its denial of Lee's remand motion for interlocutory appeal under 28 U.S.C. § 1292(b), stating its view that the requirements of that section were met.[3] In particular, the court acknowledged in its certification

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[2] The district court also denied Lee's motion in the alternative to remand only the ANTEX claims.

[3] Section 1292(b) provides, in pertinent part:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order

order that there was substantial ground for difference of opinion on the question whether the court's conclusion "that plaintiff has no Article III standing as to two of the removed state law causes of action against one defendant[]requires that the entire case be remanded to state court." This court agreed that interlocutory appeal was appropriate and granted Lee's petition for interlocutory review of the district court's certified order. We therefore have jurisdiction over Lee's appeal under 28 U.S.C. § 1292(b).

Our jurisdiction under § 1292(b), it is worth noting, is not limited to deciding the precise question the district court certified to us. Rather, we are reviewing the district court's order refusing to remand the case, and may address any issue fairly included within that order. *Yamaha Motor Corp. USA v. Calhoun*, 516 U.S. 199, 205 (1996). We review de novo the district court's order denying Lee's motion to remand. *ARCO Envtl. Remediation L.L.C. v. Dept. of Health & Envtl. Quality*, 213 F.3d 1108, 1111 (9th Cir. 2000).

II. Discussion

Lee, a California resident, originally filed this action in California Superior Court. Both defendants, ANI and

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> involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals ... may thereupon, in its discretion, permit an appeal to be taken from such order ...."

ANTEX, are Texas corporations whose principal place of business is Texas. The complaint states a claim by Lee for compensatory and punitive damages that will not to a "legal certainty" amount to less than the jurisdictional threshold of $ 75,000. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). On the face of things, then, the defendants' removal of this action to the district court was proper. *See* 28 U.S.C. §§ 1332, 1441.

After removing Lee's action to federal court, however, the defendants contended that Lee cannot meet federal standing requirements with respect to the claims against ANTEX. Lee now appears to accept that proposition as well, as did the district court, and argues that because he therefore cannot proceed in federal court with certain aspects of his case, the entire case must be remanded.

1. *Standing*

Although the parties now agree that the plaintiffs lack standing to prosecute the claims stated in the complaint against ANTEX, the district court never actually dismissed any claims in this case for lack of standing. Instead, the district court ruled on standing in the context of the class action motions and then necessarily assumed, for purposes of the remand motion, that the claims against ANTEX would eventually be dismissed for lack of standing if the case remained in federal court.

It would make little sense for us to decide this case on the assumption that the plaintiff lacks standing to pursue the claims it alleged against ANTEX if that were not the case. The plaintiff is arguing that the district court must decline to

entertain jurisdiction over claims that *are* otherwise properly before it because of the lack of standing over the ANTEX claims. Before considering whether we are required to oust from federal court causes of actions that are, indisputably, within both our statutory and our constitutional jurisdiction, we should determine whether there is any need to consider that course at all. And, although the standing question was not expressly certified to this court, we have, as noted, interlocutory jurisdiction to decide all questions fairly raised by the order under review, of which the district court's earlier ruling concerning standing--on which the order under review was based--is one. We therefore briefly address the standing issue.

We agree with the consensus view of the parties and the district court that Lee cannot proceed with his claims against ANTEX in federal court. Lee's action against ANTEX stems from his right under California law to challenge the company's allegedly unfair business practices as a private attorney general even if he suffered no individualized injury as a result of the defendant's challenged conduct. Cal. Bus. & Prof. Code § 17204 (authorizing civil action to enforce Unfair Business Practices Act, Cal. Bus. & Prof. Code §17200, by "any person acting for the interests of itself, its members, or the general public"); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 561 (1998). Article III of the Constitution, however, limits the jurisdiction of the federal courts to "cases and controversies," a restriction that has been held to require a plaintiff to show, *inter alia*, that he has actually been injured by the defendant's challenged conduct. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000). So a plaintiff whose cause of action is perfectly viable in state court under state law may

nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury. *See, e.g., Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001); *Fiedler v. Clark*, 714 F.2d 77, 79-80 (9th Cir. 1983); *Toxic Injuries Corp. v. Safety-Kleen Corp.*, 57 F. Supp. 2d 947, 954-56 (C.D. Cal. 1999). And Lee cannot, because he did not buy any policy from ANTEX and so did not suffer any injury due to ANTEX's conduct.

Even if Lee has a viable action against ANTEX in state court under the California Unfair Business Practices Act, then, he may not proceed with that cause of action in federal court.[4]

2. *Removal and Remand*

Lee's primary contention in this appeal is that his lack of standing as to one defendant has destroyed subject matter jurisdiction in federal court over the entire case. The notion, it appears, is that by analogy to the "complete diversity" rule, applicable where some but not all of the parties on the two

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[4] The seemingly obvious proposition that a removed case may not go forward in federal court unless Article III standing requirements are met as to some claims may not obtain in cases removed to federal court pursuant to all removal statutes. In *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 78 n.4, (1991), the Supreme Court expressly left open the question whether a plaintiff must have Article III standing with respect to state law claims within the federal court's supplemental jurisdiction to permit removal under 28 U.S.C. § 1442(a), the statute allowing federal officer defendants to remove cases from state court.

sides are of diverse citizenship from one another. a diversity case cannot go forward where there is Article III jurisdiction over the claims against some but not all of the parties.

The analogy, however, simply does not work, for three reasons: First, under this circuit's precedents, it is clear that, as a general matter, there is original jurisdiction, and therefore removal jurisdiction under 28 U.S.C. § 1441(a), over a case as long as there is subject matter jurisdiction over one or more of the claims alleged. Second, although the complete diversity rule is, in a sense, an exception to that principle, it is one that is based on a longstanding interpretation of the statute governing diversity jurisdiction that is of no pertinence to the question before us. Finally, the Supreme Court's decision in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 391-92 (1998), makes clear that a district court may not under § 1447(c) remand a case in its entirety where there is subject matter jurisdiction over some portion of it, a holding that cannot be squared with Lee's position in this case.

A. *The general rule concerning removal jurisdiction where the federal court has jurisdiction over some but not all of a case*

The statute that governs removal jurisdiction in this case, 28 U.S.C. § 1441(a), allows removal of "any civil action" over which the district court has original jurisdiction.[5]

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[5] 28 U.S.C. § 1441(a) provides:

"Except as otherwise expressly provided by Act of

Our circuit has held that the presence of at least some claims over which the district court has original jurisdiction is sufficient to allow removal of an entire case, even if others of the claims alleged are beyond the district court's power to decide. *Kruse v. State of Hawaii,* 68 F.3d 331, 334-35 (9th Cir. 1995).

In *Kruse*, we considered whether a case involving claims against some state and some individual defendants was properly removed to federal court. The plaintiff maintained that removal was improper, and remand was necessary, because the state defendants were asserting Eleventh Amendment immunity from suit. *Id.* at 334. We held that the Eleventh Amendment bar to deciding some of the plaintiff's claims had no bearing on the district court's original jurisdiction over her case as a whole. Rather, because there was federal jurisdiction over some of her claims, the plaintiff's entire case was removable from state court. *Id.* at 335. In concluding that the plaintiff's entire case was removable because it was within the district court's original jurisdiction, we specifically rejected the contrary view, espoused by the Fifth and Seventh Circuits, that "removal was improper because the federal court did not have jurisdiction over *all* of the claims asserted in the action." *Id.* at 334 (citing *McKay v. Boyd Constr. Co.,* 769 F.2d 1084, 1086-87 (5th Cir. 1985); *Frances J. v. Wright,* 19 F.3d 337, 340-41 (7th

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> Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

Cir. 1994)) (emphasis in original).

Nothing in our decision in *Kruse* hinged on the nature of Eleventh Amendment immunity as opposed to any other constitutional limit on federal jurisdiction. Rather, we agreed with the Sixth Circuit's approach that "a jurisdictional bar against particular *claims*, and not entire cases ... should not deprive the district court of its *otherwise proper* jurisdiction over the action." *Id.* at 334 (citing *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 338-39 (6th Cir. 1990)) (emphasis added). *Kruse* thus recognized as a general matter that federal jurisdiction over a removed case is "otherwise proper" so long as *some* claims alleged were within the district court's power to decide, even if the district court cannot decide *all* the claims before it.

Our circuit's reading of § 1441(a) is consistent with that enunciated two years later by the Supreme Court. In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the city defendant removed to federal court a plaintiff's lawsuit comprising some federal question claims and some state-law claims reviewing state administrative action. The Court explained that the federal claims within the plaintiff's case:

> suffice[d] to make the actions "civil actions" within the "original jurisdiction" of the district courts for purposes of removal. § 1441(a).... [The] federal claims, "if brought alone, would be removable to federal court." [Citation omitted.] Nothing in the jurisdictional statutes suggests that the presence of related state law claims somehow alters the fact that [the

> plaintiff's] complaints, by virtue of their federal claims, were "civil actions" within the federal courts' "original jurisdiction."

Id. at 166. Stated otherwise, the presence of *some* federal question claims in the plaintiff's case made the case one over which the district court would have original jurisdiction, a proposition that federal court litigators would find wholly unremarkable.

Schacht considered but rejected the suggestion that, because of the availability in that context of supplemental jurisdiction over the state law claims and because of the special provision for removing federal question cases when the federal question is accompanied by a "separate and independent" state law claim, *City of Chicago's* construction of § 1441(a) is pertinent only where the jurisdictional defect concerning some of the causes of action is the failure to assert a federal question context. 524 U.S. at 387-91; *see* 28 U.S.C. §§ 1367(a) & 1441(c). Although in doing so *Schacht* relied in large part on the consideration that Eleventh Amendment immunity is waivable, *id.* at 389, that focus is understandable, given the fact that in the case before the Court it was Eleventh Amendment immunity that assertedly affected removal jurisdiction. On its face, however, the discussion of § 1441(a) in *City of Chicago* is simply a generic interpretation of that statute, not dependent on the nature of the claims that brought the case within the federal court's jurisdiction, and not dependent either on the nature of the defect that rendered some of the claims beyond the federal court's authority.

Indeed, the Court in *City of Chicago, "having ... established federal jurisdiction,"* only then went on to discuss whether "the accompanying state claims ... fall within a district court's supplemental jurisdiction, not its original jurisdiction." 522 U.S. at 167. So *City of Chicago* quite explicitly viewed the § 1441(a) "original jurisdiction" issue as entirely distinct from the special rules governing retention of jurisdiction in federal question cases over claims *not* within the federal courts' original jurisdiction.

Kruse, City of Chicago, and *Schacht* all involve cases removed to federal court because they presented claims arising under federal law. This case was removed pursuant to the federal court's diversity jurisdiction. There is no meaningful distinction between federal question and diversity jurisdiction, however, that would direct a different result in this case. Section 1441(a) governs the removal of both kinds of cases. We conclude that, in this case, the district court has jurisdiction over at least some of Lee's claims, such that the case could have been filed in federal court originally, and so had removal jurisdiction.

B. *The relationship between Lee's lack of standing and "complete diversity"*

Lee's contention that this case was nonetheless improperly removed from state court because his lack of standing against one defendant destroyed "complete diversity" of the parties is utterly unavailing.

Federal subject matter jurisdiction in this case is based on diversity. Although Article III of the Constitution would permit the federal courts to exercise jurisdiction over a

broader class of diversity cases, *see State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967), Congress has limited the scope of diversity jurisdiction to cases involving particular alignments of parties. *See* 28 U.S.C. § 1332(a).[6] The diversity jurisdiction statute, as construed for nearly 200 years, requires that to bring a diversity case in federal court against multiple defendants, each plaintiff must be diverse from each defendant. *Schacht*, 524 U.S. at 388; *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

That compliance with the diversity statute, including its complete diversity requirement, is the *sine qua non* of diversity jurisdiction was made clear in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). In a case involving claims against multiple defendants, "the plaintiff must *meet the requirements of the diversity statute* for each defendant."

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[6] 28 U.S.C. § 1332(a) provides, in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000 ... and is between--
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state ... as plaintiff and citizens of a State or of different States.

Id. at 829 (emphasis added and emphasis in original omitted). One of the *Newman-Green* defendants, an American citizen who lived overseas, fell within none of the statutory categories of parties over whom the federal courts may exercise diversity jurisdiction. Because he was not domiciled in any state, this defendant was "stateless" for purposes of the diversity statute, and, under the strictures of § 1332, the plaintiff could not pursue an action in federal court against him. *Id.* at 828. For this reason, the defendant's presence in the case destroyed "complete diversity," rendering the entire case beyond the federal court's power to decide unless he was dismissed. *Id.* at 829.

By insisting that a party who corresponds to none of § 1332(a)'s categories destroys original jurisdiction over a diversity case, *Newman-Green* clarified that the touchstone of diversity jurisdiction, and of "complete diversity," is compliance with the specific dictates of § 1332. At the same time, compliance with the geographical and amount-in-controversy requirements of the diversity statute is also the only *necessary* condition for diversity jurisdiction under §1332. Except for the amount-in-controversy requirement, nothing in §1332 imposes any relevant requirement other than complete diversity of citizenship for coming within that statute. We therefore have no basis for concluding, as Lee invites us to do, that statutory diversity jurisdiction under §1332 fails if jurisdiction over one defendant fails for a reason *other than* lack of diverse citizenship.

That Article III standing has nothing to do with the presence of diversity of the parties is further borne out by the very different considerations underlying the two jurisdictional doctrines. Traditionally, diversity jurisdiction has been

viewed as serving the interest in protecting out-of-state defendants from potential state-court bias in favor of local plaintiffs. *See generally* Wright, Miller & Cooper, *Federal Practice & Procedure* § 3601 (2d ed. 1984). The standing doctrine, on the other hand, derives from the interests in ensuring that parties have the proper incentives to litigate cases as vigorously as they can and in avoiding adjudication of generalized grievances that are better resolved through the legislative process. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-76 (1982).

Lee's standing problem simply does not implicate the question whether the alignment of parties corresponds with §1332's requirements for diversity jurisdiction. The parties in this case remain citizens of different states, over whom the federal court may exercise jurisdiction under § 1332(a)(1). Lee's lack of standing only renders his claims against ANTEX nonjusticiable in federal court, but does not alter the presence of complete diversity.

C. *The district court's authority to remand a case where it has jurisdiction over only some but not all of the claims within the case*

Finally, *Schacht* makes clear that the general remand statute, 28 U.S.C. §1447(c), does not provide for a remand in the present circumstances.

Schacht concerned a terminated prison guard's § 1983 action, filed in state court, against the state corrections department and several of its employees. *See* 524 U.S. at 383. The defendants removed the suit to federal court under 28

U.S.C. § 1441(a) because the guard's claims arose under federal law. Immediately thereafter, the corrections department asserted that its Eleventh Amendment immunity precluded the guard's damages claim against it. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978). The Seventh Circuit held that because the Eleventh Amendment barred the federal court from deciding certain claims, the entire case had been improperly removed from state court, and had to be remanded. *Schacht*, 524 U.S. at 385.

The Supreme Court reversed. After determining that the case was properly removed to federal court at the outset, the Supreme Court rejected the plaintiff's contention that "if the 'district court lacks subject matter jurisdiction' over *any* claim, then *every* claim, i.e., the entire 'case,' must be 'remanded' to the state court." *Id.* at 391 (emphasis in original).

The remand statute, 28 U.S.C. § 1447(c), requires a district court to remand a removed "case" to state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." Assuming for the purpose of interpreting this statute that the Eleventh Amendment bar to federal-court litigation of certain claims was "a matter of subject-matter jurisdiction," *Schacht*, 524 U.S. at 391, the Court construed § 1447(c) to mean that the case must be remanded only if subject matter-jurisdiction is lacking over the entire case, and not over just some of the plaintiff's claims. *See id.* at 392 ("An ordinary reading of the language indicates that the statute refers to an instance in which a federal court 'lacks subject matter jurisdiction' over a 'case', and not simply over one claim within a case.").

Like the plaintiff in *Schacht*, Lee argues that "because the district court lacks subject matter jurisdiction over any claim, ... every claim, i.e., the entire case, must be remanded to the state court." *Id.* at 391 (internal quotation marks omitted). Because the *Schacht* Court squarely rejected this proposition, so must we. The district court lacks jurisdiction to decide only some, but not all, of Lee's claims; the court, therefore, could not have remanded Lee's entire case.

Lee's standing-deficient claims will have to be disposed of in some manner on remand to the district court. Whether the district court dismisses the ANTEX claims, or Lee dismisses them voluntarily, there should be no obstacle to Lee's refiling them in state court, where he apparently has a viable cause of action which is not time-barred.[7] *See Appalachian Ins. Co. v. McDonnell Douglas Corp.*, 214 Cal. App. 3d 1, 40-41 (Ct. App. 1989); *see also Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1136-39 (9th Cir. 2001) (en banc) (summarizing California equitable tolling doctrine). Whether the statute of limitations on a state-law cause of action is tolled under circumstances like those present in this case is, of course, a matter of state law. *Cf.* 28 U.S.C. § 1367(d) (tolling state statutes of limitations for state-law claims dismissed pursuant to the supplemental jurisdiction

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[7] That Lee appears to have a viable state-court cause of action against ANTEX negates the appellees' suggestion that ANTEX was fraudulently joined to defeat federal jurisdiction. *Cf. Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998) (because the plaintiff's claims against two non-diverse defendants were time-barred, those defendants had been "fraudulently joined" and did not affect the district court's removal jurisdiction over the case).

statute). In some cases, a plaintiff might forfeit an otherwise viable state-law claim because that claim was part of a removed diversity case which was subsequently determined to be beyond the federal court's power to decide, a result which might militate in favor of remanding, rather than dismissing, nonjusticiable state-law claims. *Cf. Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 351-52 (1988) (finding the plaintiff's forfeiting of viable state-law claims a "potent reason" for allowing district courts to remand remaining state-law claims initially removed pursuant to the district courts' supplemental jurisdiction).

We need not decide, however, whether the district court could remand only Lee's standing-deficient claims against ANTEX while retaining his other claims, a position Lee advocated earlier in this litigation.[8] Lee's consistent position on this appeal has been that his case must be remanded in its entirety. Even if we were to construe the

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[8] *Schacht* left open the possibility that § 1447(c) might permit a district court to retain claims over which the court has subject matter jurisdiction, but remand those over which it lacks jurisdiction. 524 U.S. at 392. ("Conceivably, one might also read [§ 1447(c)'s] reference to 'case' to include a claim within a case as well as the entire case. ... [This reading] requires remand only of the relevant claims, and not the entire case."). Some support for this interpretation of § 1447(c) derives from the historical origins of the term "civil action" in the removal statutes. *See Charles D. Bonanno Linen Serv. Inc. v. McCarthy,* 708 F.2d 1, 11 (1st Cir. 1983); *Langford v. Gates,* 610 F. Supp. 120, 122 (C.D. Cal. 1985). For the procedural reasons delineated in the text, however, we have no occasion in this case to decide whether such a partial remand would be appropriate.

district court's certified order as also encompassing the denial of Lee's alternative motion to remand only the ANTEX claims, we would decline to address the partial remand alternative here because Lee did not "present a specific, cogent argument for our consideration" on appeal. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); *see also Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997).

Our circuit's interpretation of § 1441(a) and *Schacht's* interpretation of § 1447(c) admittedly may result in largely duplicative state and federal court proceedings in this case and others like it. A case that is properly removed in its entirety may nonetheless be effectively split up when it is subsequently determined that some claims cannot be adjudicated in federal court.[9] Lee raised this prospect as a reason for remanding his entire case (and the defendants raised it as a reason for retaining the entire case in federal court). *Schacht*, however, has foreclosed the possibility that any preference against forcing the plaintiff to split up his case, both for judicial economy reasons and because the plaintiff enjoys some

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[9] *Schacht's* precise holding plainly could lead to such parallel state and federal court litigation if it turned out, on due consideration, that partial remand is not a viable alternative: In a case such as *Schacht*, the district court may decide the plaintiff's claims against state employees sued in their individual capacity, but, if the state asserts its Eleventh Amendment immunity, may not decide claims against the state. The Eleventh Amendment is no bar, however to *state* court jurisdiction over a plaintiff's cause of action against a state, *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980), so long as the state has consented to suit in its own courts. *Nevada v. Hall*, 440 U.S. 410, 414 (1979).

entitlement to litigate his case as he chooses to, can override the language of § 1447(c) proscribing a remand of the entire case when there is subject matter jurisdiction over some of it.

III. Conclusion

In sum, Lee lacks standing to sue ANTEX in federal court, but he and ANTEX are still diverse parties as defined by 28 U.S.C. § 1332. The standing defect renders Lee's claim against ANTEX non-justiciable in federal court, but it does not affect the district court's original jurisdiction over the remaining claims in this diversity case. Because the case is within the district court's original jurisdiction, it was properly removed under 28 U.S.C. § 1441(a), and may not be remanded in its entirety to state court. Finally, for the procedural reason indicated above, we do not address the question whether it would have been proper to remand only the claims against ANTEX to state court.

AFFIRMED and REMANDED for further proceedings consistent with this opinion.

CONCUR:

KOZINSKI, Circuit Judge, joining in part and concurring in the judgment:

I reach the same result as the majority, but am unable to join all of its opinion. Specifically, I can't sign on to Part II.2.A, which needlessly complicates the question of whether the district court properly removed the case from state court.

District courts have "original jurisdiction" under 28 U.S.C. § 1332(a) so long as the parties are completely diverse and the amount in controversy exceeds $ 75,000. And 28 U.S.C. § 1441 says that a case is removable where it falls within the district court's "original jurisdiction." Here, the parties are completely diverse and more than $ 75,000 is at stake. Therefore, the district court would have had original jurisdiction over the case, and it is removable. The statutory command could hardly be clearer.

It's true that, in federal question cases, a jurisdictional bar against some claims does not deprive a court of jurisdiction where other claims arise under federal law. *See City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 166 (1997); *Kruse v. Hawaii*, 68 F.3d 331, 334-35 (9th Cir. 1995). But here we don't have a case where some claims arise under federal law and others don't: None of them do, which is why the case falls within the district court's original jurisdiction only under section 1332, not 1331. Unlike federal-question jurisdiction, diversity jurisdiction turns, not on the nature of the claims, but on the status of the parties. There is no such thing as partial diversity jurisdiction; if the parties are not completely diverse as to all claims, the district court loses original jurisdiction over the entire case. *See Wis. Dep't of Corrs. v. Schacht*, 524 U.S. 381, 388-89 (1998).

Where the district court has "original jurisdiction" pursuant to section 1332, the case is removable and our inquiry ends. Only at the next step, when we ask whether the case should be remanded, need we address questions of standing and other aspects of "subject matter jurisdiction." *Compare* 28 U.S.C. § 1441(a) ("Any civil action brought in a State court of which the district courts of the United States

have *original jurisdiction*, may be removed ...." (emphasis added)), *with id.* § 1447(c) ("If at any time before final judgment it appears that the district court lacks *subject matter jurisdiction*, the case shall be remanded." (emphasis added)). The majority recognizes this in the next subsection of the opinion: "Lee's standing problem simply does not implicate the question whether the alignment of parties corresponds with § 1332's requirements for diversity jurisdiction." Maj. Op. at 10412. With this I agree--Lee's standing-deficient claims have no bearing on the district court's original jurisdiction or whether the case was properly removed; there are no defects in the district court's original jurisdiction. Part II.2.A's reliance on federal question cases where the district court has jurisdiction over some but not all of the claims is inapposite in a case where jurisdiction is established on the basis of diversity. Its inclusion is unnecessary and could be misleading. I am therefore unable to join that portion of the opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-97-1532-CAL

[Filed March 4, 1999]

HOWARD M. LEE, et al.	)
Plaintiffs,	)
	)
v.	)
	)
AMERICAN NATIONAL INSURANCE	)
COMPANY, et al.,	)
Defendants.	)
	)

ORDER DENYING PLAINTIFF'S MOTION FOR REMAND, AND CERTIFYING ORDER FOR APPELLATE REVIEW

This action was removed to this court from state court, on the ground of the complete diversity between plaintiff and the two defendants. The causes of actions alleged are various state law causes of action.

Following removal, plaintiff made motions for class certification, which motions were denied. In the course of ruling on those class motions, this court determined that

plaintiff has no Article III standing as to one defendant on some of the causes of action.

Thereafter, plaintiff moved to remand the case, contending that the decision on Article III standing had established the absence of diversity. The court orally denied the motion to remand, for the reasons stated on the record in open court on December 11, 1998 and February 26, 1999. This order confirms that oral decision. The motion to remand is denied.

Plaintiff requests that the denial of remand be certified for interim appeal under 28 U.S.C. Section 1292(b). This court determines that its remand decision does involve a controlling question of law; that is, whether this court's decision on the class motions, that plaintiff has no Article III standing as to two of the removed state law causes of action against one defendant, requires that the entire case be remanded to state court. There is a substantial ground for difference of opinion on that question. And an interim appeal from the denial of remand may materially advance the ultimate termination of litigation, in that it deals with the jurisdiction of this court to proceed with the remainder of the case. IT IS THEREFORE ORDERED that plaintiff's motion for certification under 28 U.S.C. Section 1292(b) is granted.

There will be a status conference on April 2, 1999 at 11:00 a.m. to determine whether the remainder of the action should be stayed pending the interim appeal, or whether discovery should nevertheless proceed. That subject was discussed briefly at the hearing on February 26, 1999, but the court is not sufficiently advised to resolve the question at this time.

IT IS SO ORDERED.

Dated: March 4, 1999.

/s/_____
CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-15846

[Filed September 27, 2001]

HOWARD M. LEE, Plaintiff-Appellant,	)
v.	)
AMERICAN NATIONAL INSURANCE COMPANY; AMERICAN NATIONAL INSURANCE COMPANY OF TEXAS, Defendant-Appellee.	)

DC# CV-97-01532-CAL
Northern District of California

ORDER

Before: KOZINSKI, HAWKINS and BERZON, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and petition for rehearing en banc.

Court of Appeals Order, September 27, 2001

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX D

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C97-1532 CAL

[Filed July 20, 1998]

HOWARD M. LEE, individually and on behalf of all others similarly situated, Plaintiffs,	)
v.	)
AMERICAN NATIONAL INSURANCE COMPANY; AMERICAN NATIONAL INSURANCE COMPANY OF TEXAS; and DOES 1 through 500, inclusive, Defendants.	)

ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

The Court having duly considered all the papers presented to it, including all evidentiary exhibits and moving papers in support of and in opposition thereto, and having heard the arguments of counsel at hearing in this action on June 16, 1998 at 3:00 p.m., the Court hereby orders that plaintiffs' Motion for Class Certification seeking a nationwide class of policyholders to whom defendants issued participating whole life and universal life policies is denied based on the findings and conclusions of the Court as stated and read into the record at the hearing, all of which are hereby incorporated

herein by reference, including but not limited to the Court's conclusion that plaintiff has failed to satisfy the requirements of Federal Rule of Civil Procedure 23.

IT IS SO ORDERED.

Plaintiff is permitted to file a modified motion for class certification seeking a narrower class.

/s/_____
Hon. Charles A. Legge
UNITED STATES DISTRICT JUDGE

Approved as to form and content:

/s/_____
Marie Seth Weiner
Cotchett, Pitre & Simon
Counsel for Plaintiff
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APPENDIX E

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AMERICAN NATIONAL INSURANCE COMPANY
COMPANY and AMERICAN NATIONAL LIFE
INSURANCE COMPANY OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C97-1532 CAL

[Filed November 18, 1998]

HOWARD M. LEE, individually and on behalf of all others similarly situated, Plaintiffs,	)
v.	)
AMERICAN NATIONAL INSURANCE COMPANY; AMERICAN NATIONAL INSURANCE COMPANY OF TEXAS; and DOES 1 through 500, inclusive, Defendants.	)

ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

The Court having duly considered all the papers presented to it, including all evidentiary exhibits and moving papers in support of and in opposition thereto, and having heard the arguments of counsel at hearing in this action on October 2 1998 at 9:30 a.m., the Court hereby orders that plaintiffs' 1998, second Motion for Class Certification in this action, seeking a California class of policyholders as described in plaintiff's moving papers, is denied based on the findings, conclusions, and rulings of the Court as stated and read into the record at the hearing, all of which are hereby

incorporated herein by reference, including but not limited to the Court's conclusion that plaintiff has failed to satisfy the requirements of Federal Rule of Civil Procedure 23, and that plaintiff's claims under California Business & Professions Code sections 17200 and 17500 are not justiciable under Article III.

IT IS SO ORDERED.

Plaintiff is not prohibited from filing a further motion for class certification.

DATED: November 18, 1998

/s/_____
Hon. Charles A. Legge
UNITED STATES DISTRICT JUDGE

Approved as to form and content:

/s/_____
Marie Seth Weiner
Cotchett, Pitre & Simon
Counsel for Plaintiff
HOWARD M. LEE

(2)

No. 01-984

Supreme Court, U.S.
FILED
FEB 7 2002

In The

Supreme Court of the United States

HOWARD M. LEE, individually and on behalf of all others similarly situated,

Petitioner,

v.

AMERICAN NATIONAL INSURANCE COMPANY; AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I. STATEMENT OF THE ISSUES

1. Whether, when the two statutory requirements of 28 U.S.C. § 1441(b) are met – that is, complete diversity between the plaintiff and multiple defendants and the amount in controversy exceeds $75,000 – removal jurisdiction on diversity grounds is authorized even if it is later determined that there is a lack of standing as to the claims against one of the defendants.

2. Whether, in a case satisfying the complete diversity requirements, a district court is nevertheless required under 28 U.S.C. § 1447(c) to remand the entire case when the plaintiff arguably lacks standing to bring his claims against one, but not all, of the diverse defendants.

II. STATEMENT OF THE CASE

This Petition arises from Plaintiff/Petitioner Howard Lee's ("Lee") desire to have his unique claims heard in state, rather than federal, court. Dissatisfied with the district court's rulings denying class certification and after this removed action had been pending in federal court without objection for over one and one-half years, Lee sought a remand to state court. In support of that motion, he admitted, as he had all along, that there was diversity jurisdiction, but nonetheless argued that a lack of standing as to some, but not all, of the removed claims required remand.

There was, and still is, one fundamental hurdle in Lee's effort to get back to state court: there has always been proper federal subject matter jurisdiction over this entire case. After considering full briefing by both parties

and holding a hearing on the issue, the district court properly denied Lee's motion for remand. The district court entered its Order Denying Plaintiff's Motion for Remand and Certifying Order for Appellate Review on March 4, 1999.

On appeal to the Ninth Circuit Court of Appeals, Lee argued that since he lacked Article III standing over his claims against *one* defendant, the district court somehow lacked diversity jurisdiction over this *entire* case. The fatal flaw in Lee's reasoning, however, was that in this extraordinarily unusual circumstance involving multiple defendants and claims that, in state court, do not require plaintiffs to have standing to bring them, diversity jurisdiction is not dependent upon a plaintiff's standing to litigate a claim against one of multiple defendants. Rather, the proper exercise of diversity jurisdiction turns solely upon a plaintiff's ability to meet the two statutory requirements under 28 U.S.C. § 1441(b). Nothing more.

On August 8, 2001, the Ninth Circuit recognized the central flaw of Lee's jurisdictional syllogism and affirmed the district court's holding:

> Lee's standing problem simply does not implicate the question whether the alignment of parties corresponds with § 1332's requirements for diversity jurisdiction. The parties in this case remain citizens of different states, over whom the federal court may exercise jurisdiction under § 1332(a)(1). Lee's lack of standing only renders his claims against [one defendant] nonjusticiable in federal court, but does not alter the presence of complete diversity.

Appendix, p. 16a.

As both the district court and the Ninth Circuit correctly ruled, diversity jurisdiction and Article III standing standards represent two separate points of analysis. Diversity jurisdiction is proper when, as here, there is complete diversity between all of the parties and the amount in controversy exceeds $75,000. Article III standing, on the other hand, addresses a plaintiff's ability to proceed on the merits of a case in federal court.

As there was no dispute that diversity jurisdiction existed at the time of removal, the Ninth Circuit confirmed the district court's unnoteworthy decision that remand to state court must be denied. The fact that this case raised the highly *sui generis* circumstance that, post remand, Lee lacked Article III standing to bring otherwise proper state court claims against one of multiple defendants did not support a different conclusion. Neither the removal statute nor the statute conferring diversity jurisdiction requires Article III standing as to each and every defendant for diversity jurisdiction to be proper. Thus, contrary to Lee's claim, his unique circumstance does not warrant remand to state court, nor is it appropriate for review here by writ of certiorari.

III. STATEMENT OF THE FACTS

There is no dispute about the facts of this case. Lee filed this action in March 1997 in his personal capacity and as a representative of a putative class against defendants American National Insurance Company ("ANICO") and American National Life Insurance Company of Texas ("ANTEX"). The action, filed originally in San Francisco Superior Court, alleged claims for consumer fraud in

violation of California's Business & Professions Code ("B & P Code") § 17200 et seq. and various other state law claims. Petitioner's Appendix ("Appendix"), p. 2a. In April 1997, Defendants timely removed the case to the district court on the basis of diversity jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1441. The removal was proper and uncontested. Appendix, p. 3a.

Subsequent to removal, Lee brought two motions for class certification. The first motion was for certification of a nationwide class. In his second motion, Lee sought to certify a statewide class action. As to defendant ANICO, Lee requested certification of a California class on all claims. The district court denied both motions for class certification of the claims against ANICO. With respect to defendant ANTEX, Lee requested certification of a California class only on his claim for unfair business practices under the B & P Code. The district court denied the motion for class certification as to the two claims against ANTEX. The denial appeared to be in conjunction with the court's finding that Lee suffered no actual injury in those claims and, therefore, did not have standing to litigate his claims against ANTEX in federal court. *Id.* The district court never suggested, much less held, that diversity jurisdiction did not continue, instead ruling that the denial of class certification was without prejudice.

Rather than proceed individually before the district court, however, Lee next sought to avoid federal jurisdiction altogether by seeking a remand of all claims in the action (individual and class-wide). *Id.*, p. 3a-4a. In the alternative and without explanation, Lee sought a partial remand the claims raised under the B & P Code.

Specifically, Lee requested remand under 28 U.S.C. § 1441(c) and 28 U.S.C. § 1447(c) on the ground that he purportedly lacked standing as to the claims against one, but not all, of the Defendant/Respondents. *Id.*, p. 4a. The district court properly denied this remand motion. As both the district court and, later, the Ninth Circuit Court of Appeals ruled, notwithstanding the district court's ruling as to Article III standing, it always had and still has diversity subject matter jurisdiction over the case. Remand under § 1447(c) was, therefore, improper.

IV. ARGUMENT

A. The Unique Procedural Issues Presented Here Are Not Appropriate For Review By Way of Certiorari.

This Petition seeks review of two related issues recently decided by the Ninth Circuit Court of Appeals: (1) whether, where the requirements of 28 U.S.C. § 1441(b) are met, diversity jurisdiction is destroyed simply because a plaintiff lacks Article III standing against one of the defendants and (2) whether a district court is required under 28 U.S.C. § 1447(c) to remand an entire case, in these circumstances, where the plaintiff has Article III standing to bring his claims against one defendant but arguably lacks Article III standing to bring some or all of his claims against the other defendant.

Presented with these same questions, the Court of Appeals made the correct and unremarkable determination that removal is proper and remand unavailable when there is original federal subject matter jurisdiction over a

case, even if there are claims over which Article III standing is lacking. Here, Lee reasserts his claim that the entire case should have been remanded due to an alleged jurisdictional deficiency over one, but not all, removed claims. Not only is Petitioner's construction of § 1441(b) and § 1447(c) incorrect, he does not even satisfy the threshold requirements for review by writ of certiorari.

The Supreme Court Rules are clear that a Petition for Writ of Certiorari "is not a matter of right, but of judicial discretion." Supreme Court Rule 10. In that spirit, "[a] petition for a writ of certiorari will be granted only for compelling reasons." *Id.* The Supreme Court Rules set out specific circumstances in which review may be appropriate. In an attempt to satisfy the requirements for review by certiorari, Petitioner claims the Court should grant review here because the Court of Appeals has decided an important question of federal law that has not, but should be, settled by this Court and/or had decided an important federal question in a way that conflicts with relevant decisions of the Court or that creates a conflict among the circuits. Petition, p. 10. As set forth more fully below, despite Petitioner's claims, neither circumstance is present here and the instant Petition should be denied.

1. The arcane procedural issues here present no compelling reason for the Court's review.

The issues presented here arise only in the unique and arcane situation where a case, containing multiple state claims against multiple defendants, is removed to federal court on the basis of diversity jurisdiction but

where, in federal court, plaintiff does not have Article III standing as to one of the defendants. This scenario would appear to be limited to California's *sui generis* relaxed standing rules in an isolated statutory context, namely B & P Code § 17200.

Here, Lee alleges claims for consumer fraud in violation of B & P § 17200 et seq. and various other state law claims against both ANICO and ANTEX. California's B & P Code § 17200 is a private attorney general statute that allows individuals to bring unfair business practices claims on behalf of the public even without having suffered any personal injury. Once removed, however, Lee could not establish standing to continue with this claim in federal court against ANTEX because he had not purchased an ANTEX policy and thus suffered no injury. Accordingly, even though California's unfair business practices statute requires no actual injury to pursue a claim in state court, Lee could not meet Article III's standing requirements as to one defendant in federal court.

This predicament of mixed standing claims is rare. California's "no standing" rule for claims under B & P Code § 17200 is peculiar and, therefore, the jurisdictional question presented here is neither compelling nor important and need not be settled by this Court. Indeed, this *sui generis* issue arises only in the limited and infrequent circumstances where diversity jurisdiction is proper, but where plaintiff fails to meet the requirements of Article III as to one of multiple defendants. Indeed, the issues raised by this Petition are particularly insignificant since the defective state law claim – the § 17200 claim – could have been, and may still be, refiled without consequence

in state court. Thus, the Court of Appeals' affirmation of the district court simply does not prejudice Lee in any cognizable way.

2. The Court of Appeals' affirmation of the district court's ruling neither conflicts with any relevant decision of this Court, nor does it create a conflict among the circuits.

The unusual issue of mixed standing claims in a diversity context has never arisen before in any published decision and the Court of Appeals' decision thus does not conflict with a ruling of this Court, any circuit court, or any State court of last resort. Not only has this issue never been considered, it is unlikely to arise again given the unique factual circumstances of this case.

Additionally and as set forth more fully below, to the extent that analogous situations have been considered and decided, the Court of Appeals' decision is in accord with this Court's relevant decisions on subject matter jurisdiction. Review by writ of certiorari is thus unwarranted.

B. There Is, And Always Has Been, Complete Diversity In This Case.

In addition to failing to meet the threshold requirement of Supreme Court Rule 10, this Petition also fails on its merits. It is a bedrock principle of federal law that cases, such as this one, between citizens of different states can be removed to federal court on the basis of diversity jurisdiction. 28 U.S.C. § 1441(b). Removal on diversity

grounds thus authorizes jurisdiction over a plaintiff's claims even though they arise under state law. *Id.* Significantly, the propriety of removal jurisdiction ordinarily is determined at the time the notice of removal is filed, and a plaintiff cannot thereafter oust the court of jurisdiction by changing the case or recharacterizing allegations in the complaint. *See Pullman v. Jenkins*, 305 U.S. 534, 537, 59 S.Ct. 347 (1939); *Hill v. Rolleri*, 615 F.2d 886, 889 (9th Cir. 1980).

Diversity jurisdiction is proper any time that the two statutory requirements of § 1441(b) are met. The moving party must show that complete diversity exists between the parties and that the amount in controversy has been satisfied. 28 U.S.C. § 1441(b). The statute requires nothing else. There is no dispute that Defendants/Respondents met these two statutory requirements. As a result, diversity plainly existed at the time of removal and thus Defendants/Respondents' removal of the case to federal court was proper.[1]

1. A finding that a plaintiff lacks Article III standing to bring some or all of his claims against one, of two, defendants, does not divest a district court of otherwise proper diversity jurisdiction.

Despite the propriety of federal diversity jurisdiction here, Lee nevertheless arduously mixes and matches the

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[1] At no time prior to his motion for remand did Petitioner ever contest the propriety of removal or the basis of diversity jurisdiction.

two distinct jurisdictional pieces of subject matter jurisdiction and Article III standing in an effort to obtain a remand of the action to state court. To that end, Lee argues that "subject matter jurisdiction is directly dependent upon the existence of Article III standing." (citations omitted). Thus, Petitioner claims, "if the plaintiff lacks standing to pursue the alleged claims, because of plaintiff's lack of a 'personal stake' or 'actual injury,' then there is no federal [diversity] jurisdiction." Petition, p. 12.

The gravamen of Petitioner's novel legal theory is that for the proper exercise of diversity jurisdiction, the Constitution requires – contrary to the express terms of 28 U.S.C. § 1441(b) – not only diversity of citizenship and a sufficient amount in controversy, but *also* that a "controversy" exist between a plaintiff and each and every defendant. Petitioner's unsupported assertions to the contrary, diversity jurisdiction is not predicated upon plaintiff's *standing* to bring particular claims against particular defendants. The statute does not contemplate Article III standing as part of the diversity inquiry. It does not and cannot follow, then, that a lack of Article III standing as to one defendant destroys complete diversity and otherwise proper standing under 28 U.S.C. § 1441(b). As the Ninth Circuit properly concluded, Article III standing has nothing to do with the presence of diversity jurisdiction or whether the case was properly removed, but rather simply provides a jurisprudential basis for declining to hear the merits of one, among many, of the properly removed claims.

2. Lee's contention that for federal subject matter to exist, "it is not enough that the parties are of diverse citizenship" is unsupported by law.

No authority exists to support the addition of a new Article III requirement to the proper exercise of diversity jurisdiction. Despite his reliance on them, the two main cases that Petitioner cites in support of this effort are inapposite and, ultimately, not dispositive of the issue before the Court. *See National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582, 69 S.Ct. 1173 (1949); *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003 (1998).

In *National Mutual Ins.*, this Court addressed the issue whether the statute authorizing the exercise of diversity jurisdiction over claims involving citizens of the District of Columbia was constitutional in view of the Article III's grant of federal judicial authority over cases and controversies "between citizens of different States." Relying on the *Hepburn and Dundas v. Ellzey*, 2 Cranch 445, 2 L.Ed. 332 (1805), this Court concluded that the District of Columbia was not a "State" within the meaning of the Constitution and, hence, could not be a "State" for purposes of the statute. *National Mutual Ins.*, 523 U.S. at 586, 69 S.Ct. at 1175. The Court held, however, that the statutory equivalent of § 1332 was nevertheless constitutional because Congress was authorized under Article I of the Constitution to make federal courts available to citizens of the District of Columbia and individuals suing such citizens. *Id.*, 523 U.S. at 600, 69 S.Ct. at 1182. From this specific and narrow holding, Lee mistakenly extrapolates to the unrelated conclusion that there must exist a

"case or controversy" within the meaning of Article III as to each and every defendant in order for the proper exercise of diversity jurisdiction. Petition, p. 14.

National Mutual Ins. does not answer the question presented here as to whether diversity jurisdiction always is destroyed simply because a plaintiff does not have Article III standing against one of multiple defendants. *National Mutual Ins.* does not even address the scope of Article III's "case and controversy" requirement nor does it discuss the issue of the existence of diversity jurisdiction where Article III's standing requirements are not met as to each and every defendant. Rather, *National Mutual Ins.* addresses the narrow and unrelated questions of the constitutional definition of the term "State" and the power of Congress, beyond Article III, to extend the reach of the federal judiciary to the District of Columbia.[2]

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S.Ct. 1003 (1998) is equally unavailing. In support of the first step of his remand effort, Petitioner claims that *Steel Co.* represents a new overarching principle of constitutional jurisprudence whereby a district court must address the issue of Article III standing *before* it determines whether there is diversity jurisdiction. Petition, p. 15. Petitioner's reliance on *Steel Co.* is misplaced.

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[2] Notably, this Court did not address the question of statutory removal jurisdiction in *National Mutual Ins.* In that context, it has long been held that the presence of a jurisdictionally proper claim along with non-federal claims is permitted. *See* 28 U.S.C. § 1441(c).

As an initial matter, like *National Mutual Ins., Steel Co.* is not a case about the intersection of diversity jurisdiction and Article III's "case and controversy" requirement. Rather, this Court in *Steel Co.* simply decided that a federal court should not reach the merits of a claim before resolving the question of Article III jurisdiction. Thus, the *Steel Co.* limitation is fundamentally an objection to deciding "the merits" where jurisdiction is lacking. *See e.g.*, 523 U.S. at 101, 118 S.Ct. at 1003.

This Court's discussion in *Steel Co.* regarding the order of consideration of the jurisdictional aspects of the case before it does not control in the unique circumstances here. The holding in *Steel Co.* is simple – a plaintiff does not have standing to bring a claim for civil penalties for wholly past violations. While *Steel Co.* called into question how the Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S.Ct. 376 (1987), approached the case's jurisdictional question by deciding statutory subject-matter jurisdiction prior to Article III jurisdiction, *Steel Co.* notably did not overrule *Gwaltney*, but expressly reinforced that holding. *Steel Co.*, 523 U.S. at 91, 118 S.Ct. at 1011. Thus, Lee's reading of *Steel Co.* is too broad. *Steel Co.* does not hold that "the first inquiry must be 'whether there is a case or controversy under Article III.' " Petition, p. 16.

At bottom, there is simply no support for Lee's contention that "the Ninth Circuit approached this Constitutional issue *backwards*. . . . " Petition, p. 16. There is no authority, from either this Court or any circuit, holding that the existence of a "case or controversy" under Article III as to each and every defendant is integral to the

existence of federal diversity jurisdiction and must, therefore, be addressed *before* a district court assumes subject matter jurisdiction. Article III pertains only to a party's ability to litigate claims in a federal action, not to a district court's removal jurisdiction over an action. Thus, the Court of Appeals did not commit error and certainly not one of "constitutional magnitude." The Petition for Writ of Certiorari should be denied.

C. A Finding That A Plaintiff Lacks Article III Standing To Bring Some Claims Against One Defendant Does Not Authorize A District Court To Remand The Entire Case Back To State Court.

28 U.S.C. § 1447(c) governs the procedure whereby a federal court may remand a case. Section 1447(c) provides, in pertinent part, that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Lee argues that, because of a lack of standing on isolated claims, the *entire* case should be remanded under this statute. As will be shown below, this interpretation of § 1447(c) is mistaken.

Here, Lee's lack of standing against one defendant, ANTEX, does not divest the court of its diversity subject matter jurisdiction over the entire case or Lee of his federal standing as to the many other claims against the other defendant. The Supreme Court's recent decision in *Wisconsin Dept. of Corrections v. Schact*, 524 U.S. 381, 118 S.Ct. 2047 (1998) underscores this principle.

In *Schact*, defendants removed a state court complaint containing some claims barred by the Eleventh Amendment from being heard in federal court. This Court held that the presence of the barred claims did not destroy removal jurisdiction. In reaching this conclusion, this Court opined on the meaning of the phrase "*the case* shall be remanded" contained in § 1447(c). The *Schact* Court rejected Lee's view that if the court lacks subject matter jurisdiction over *any* claim, then *every* claim, *i.e.*, the entire "case" must be remanded. *Id.*, 524 U.S. at 391, 118 S.Ct. at 2054. The court stated that "an ordinary reading of the language indicates that the statute refers to an instance in which a federal court lacks subject matter jurisdiction over a 'case,' and not simply over one claim within a case." *Id.*

Thus, the fact that Lee may have no standing as to some claims against defendant, ANTEX, does not affect the continued subject matter jurisdiction of the district court, based on diversity, of this action. There is nothing in § 1447 that authorizes remand of an entire case where only isolated claims against one defendant fail under Article III.

In fact, as explained by this Court in *Schact*, § 1447(c) speaks to remand only of the entire "case" when there is no federal jurisdiction over any of the claims that remain. Such is not the case here. Lee's ability to bring his individual claims against the other defendant, ANICO, has remained untouched by the district court's determination. Federal diversity jurisdiction is thus still proper as to those remaining claims and, under the reasoning of *Schact*, remand is improper.

Lee points out that this Court noted in *Schact* that one might also read the language of § 1447(c) to include a claim within a case as well as the entire case and urges this Court to settle this hypothetically "open" question. Petition, pp. 25-26. Not even this more generous reading, however, rescues Lee's far-reaching position that the entire case should be remanded. Indeed, the *Schact* court held that even if § 1447(c) is construed to mandate remand when a claim within a case is barred, the statute, for purposes here, would "require remand only of the relevant claims, and not of the entire case as [Petitoner] contends." *Id.*, 524 U.S. at 392, 118 S.Ct. at 2054.

Lee also makes much of the fact that *Schact* and the other cases cited by the Court of Appeals involve federal question, not diversity, jurisdiction. This distinction, however, is one without a difference. Indeed, Lee's emphasis in this regard ignores one of the fundamental issues raised in this Petition: whether removal under § 1441(b) is improper simply because a separate and unrelated jurisdictional doctrine may prevent a plaintiff from litigating the merits of his claims against one defendant in federal court. In *Schact*, that separate bar was the Eleventh Amendment; here, it is lack of Article III standing. In both instances, however, isolated claims were constitutionally barred and could not be heard in federal court. Under these circumstances, this Court held in *Schact* that the continued exercise of federal jurisdiction was proper. So too here.

IV. CONCLUSION

As both the district court and the Court of Appeals held, dismissal of some claims for lack of Article III standing provides no basis for concluding that removal is improper or that remand of the entire case is appropriate particularly where the remaining claims are, as here, within the district court's federal subject matter jurisdiction and justiciable under Article III. This unremarkable conclusion is limited to the peculiar circumstance of this case, is in accord with analogous decisions regarding federal subject matter jurisdiction, and does not conflict with any decision of this Court or any circuit court. Accordingly, Defendants/Respondents respectfully request the Court to deny this Petition for Writ of Certiorari.

Respectfully submitted,

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